

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

DORA SOLARES,

Plaintiff,

VS.

Case No. 1:20-CV-0323

RALPH DIAZ, ET AL.,

Defendants.

TRANSCRIPT OF PRE-MOTION CONFERENCE VIA ZOOM
HEARD BEFORE THE HONORABLE LEE H. ROSENTHAL
UNITED STATES DISTRICT JUDGE

FEBRUARY 4, 2025

APPEARANCES:

FOR THE PLAINTIFF:	Erin R. Darling Law Offices of Erin Darling 3435 Wilshire Blvd. Suite 2910 Los Angeles, CA 90010
FOR THE DEFENDANTS:	Jeremy Duggan Office of the Attorney General 1300 I Street Suite 125 Sacramento, CA 95814
FOR LUIS SILVA:	Lynne G. Stocker Andrada & Associates 1939 Harrison Street Suite 612 Oakland, CA 94612

Official Court Reporter: Nichelle N. Drake, RMR, CRR
515 Rusk Street
Suite 8004
Houston, Texas 77002

Proceedings recorded by mechanical stenography,
transcript produced via computer.

1 **PROCEEDINGS**

2 (Call to order of the court.)

3 THE COURT: Good afternoon. Do we have everybody
4 we need?

5 MR. DARLING: I believe.

6 THE COURT: All right. Go ahead and state your
7 appearances, please.

8 MR. DARLING: Good afternoon, Your Honor, Erin
9 Darling on behalf of Plaintiff.

10 MR. DUGGAN: Good afternoon, Your Honor, Jeremy
11 Duggan on behalf of Defendant Burnes as well as Defendant
12 Pena, Ioza, Munoz, Gamboa, Gallemore, and Garcia.

13 MR. KUCHINSKY: And good afternoon, Your Honor,
14 David Kuchinsky. I am second counsel to Mr. Duggan
15 representing all the same defendants that he represents.

16 THE COURT: All right. Thank you.

17 MS. STOCKER: Good afternoon, Lynn Stocker
18 appearing for Defendant Silva.

19 THE COURT: All right. Every time I look at this
20 case, my first instinct and my first question is: Why
21 hasn't this case settled? Are you really going to tie
22 this case to a jury, or is it going to be tried before
23 Horror Films International?

24 MR. DARLING: I mean, I just will say, Your Honor,
25 we have scheduled a private mediation. I know Plaintiff

1 is taking it seriously.

2 Earlier we anticipated a panel mediator, but
3 responding to the Court's prodding, I think we're paying
4 for a private mediation because we take it seriously.

5 My own guess, though, to put a little more contour
6 to it, is that we know from Jamie Osuna's statements
7 himself that he had a desire to kill and told CDRC
8 officials about his ongoing desire to kill and Defendants
9 really don't want to produce those records of his desire
10 to kill and that may affect the valuation. And that's
11 why we're here today because they really want to not
12 produce those records because that might affect the
13 valuation because I think liability is clear.

14 THE COURT: All right. Well, then let's get to
15 the issues that you think are going to be so important in
16 terms of the evidence.

17 All right. Go ahead, please.

18 MR. DARLING: Yeah. So the Court ruled on a
19 number of RFPs. The defendant has not fully complied, so
20 I just thank the Court for having this hearing, to make
21 sure it doesn't slip through the cracks.

22 My own thought here is, we can go through these
23 one by one. Some of these have nothing to do with mental
24 health records. They're just outstanding issues, but
25 many of them do overlap with the mental health order.

1 And so I'm hoping we can first go through the RFPs and
2 then second address the pending mental health order.

3 And then last, just to note, that certain
4 defendants have filed motions to dismiss and that hasn't
5 been ruled on. And so then because of that, they haven't
6 appeared and that's also kind of affecting the timing of
7 depositions.

8 THE COURT: Remind me. Are all of those motions
9 to dismiss now ripe for decision?

10 MR. DARLING: Yes, Your Honor.

11 MS. STOCKER: Yes, Your Honor.

12 MR. DARLING: And it's Docket Nos. 100, 105, and
13 107.

14 THE COURT: Thank you.

15 MR. DARLING: Thank you.

16 So Mr. Duggan and I conferred on January 30th, so
17 this is pretty recent regarding No. 15, which is
18 allegations of dishonesty.

19 THE COURT: I'm there.

20 MR. DARLING: So in December, the Court ruled on
21 this issue. Mr. Duggan says, you know, there were a
22 bunch of 602s in the privilege log, but there's only one
23 that was responsive to the narrowing request. But then
24 -- since then, additional 602s, that bring us up to the
25 present, they haven't been received.

1 So the first point, Your Honor, is Plaintiff still
2 doesn't have them. We are in early February. This last
3 hearing was in December, so this two-month delay is
4 prejudice to Plaintiff. We need these materials. And so
5 there are the 602s that haven't been produced, that they
6 say they haven't been produced and they have not, and
7 this is even the narrowed scope. This is -- to be clear,
8 not all complaints, but it's allegations of dishonesty in
9 terms of filling out forms and procedures, and even if
10 they're unsubstantiated, so that is 15.

11 And then related is 16, which is complaints, and
12 this was narrowed and that was narrowed to bias against
13 southern Hispanics, and then there was dishonesty filling
14 out forms and the classification. And on that,
15 Mr. Duggan informed me that there were no classification
16 complaints in the privilege log, but he's now bringing
17 them up to the present. So he's expecting more documents
18 soon. So we don't know because he still doesn't have
19 them. But I would point out there's cover-ups and, so I
20 think we have a dispute because is it cover-ups or just
21 cover-ups related to classification. And I'm saying to
22 him, if it's cover-ups, it goes to dishonesty. So it's
23 not just a mere cover-up about a classification, but
24 cover-ups -- if you're covering up, you're covering up
25 and that should be at issue --

1 THE COURT: Well, if I could interject there,
2 covering up to say, for example, you overstayed on a
3 lunch period, does not seem to me to be something that is
4 necessarily included in this production. It has to be
5 something that is directly related to the performance of
6 the essential functions of the job of the correctional
7 officer.

8 MR. DARLING: Okay.

9 THE COURT: That does not include things like
10 tardiness, insubordination, unless it affects the job or
11 overstaying lunch.

12 MR. DARLING: I understand. And I would -- yes,
13 if Mr. Duggan can be pointed to cover-ups related to
14 essential functions of the job, the plaintiff would
15 welcome that. I just think it's cutting it too thin to
16 say it's just cover ups related to filling out forms.

17 THE COURT: Well, essential portions of the job
18 would include forms that related to classification
19 decisions, for example, and that's probably the easiest
20 example.

21 MR. DARLING: Sure. I think there are other
22 job-related functions, especially as a supervisor, that
23 it goes to Sergeant Burnes' power to cover up and the
24 cover-up is itself at issue in this case.

25 THE COURT: Right.

1 MR. DARLING: Yeah.

2 THE COURT: But that's going to the cart. Let's
3 stay with the horse first.

4 MR. DARLING: Okay. So if -- go ahead. I'm
5 sorry, Your Honor. Please.

6 THE COURT: All right. So 15. Where are we?
7 Have we fully covered its current status and anything
8 else that you need to do?

9 MR. DARLING: I would like the Court to put some
10 timing on this because it's been two months and we still
11 don't have it. And he said next week and I still don't
12 have anything.

13 MR. DUGGAN: Your Honor, I would like to be heard.

14 THE COURT: Of course.

15 MR. DUGGAN: Just on the -- I think that in our
16 meet and confer last week it was apparent that the
17 parties have some small disagreements about what was
18 ordered in the -- at the previous hearing --

19 THE COURT: You have a transcript, right?

20 MR. DUGGAN: Yeah. And so we were reviewing
21 the transcript -- we -- we reviewed the transcript
22 together and still, you know, a little bit of
23 disagreement over what was meant exactly. And so
24 that's -- that's part of it. And then, yeah.

25 THE COURT: So how does that affect your

1 compliance with No. 50?

2 MR. DUGGAN: So to argue it was cover-ups that are
3 limited to managing inmate access to other inmates and
4 classification or housing inmates that -- dishonesty
5 related to those -- to those matters is what was ordered.

6 THE COURT: I would add -- I would add to that
7 perhaps dishonesty in reporting responses to inmate
8 distress. I think that's very much an issue in the case,
9 and whether this was actually perceived inmate distress
10 or distress that it took deliberate indifference not to
11 see. I think you understand where I'm going. But that
12 should be part of it.

13 MR. DUGGAN: Okay. Well, I mean, with that
14 change, I will have to go back and look at that -- look
15 at them all again and look at the new ones we're getting
16 in.

17 THE COURT: Hopefully that won't be too long.

18 16.

19 MR. DARLING: Your Honor, sorry. As it relates to
20 inmate distress, I think I interpret that -- surely in a
21 broader way than Mr. Duggan will, inmate distress is not
22 about, hey, I didn't get my lunch today or late to work,
23 but as it relates to inmate sense of safety and so -- and
24 to the extent that Sergeant Burnes is a supervisor and
25 people are -- there's allegations that in his position as

1 a supervisor, you know, the way that an inmate feels
2 safe, it doesn't have to be something like I, inmate,
3 feel -- I am in distress --

4 THE COURT: No, no, no, no, no. Look. Look at
5 the allegations in this case. We have a sheet covering
6 visual access. We have a guy that is known to be a
7 violent offender housed with a new inmate. There isn't
8 any, as I recall the pleadings and I could be wrong --
9 there isn't detailed information, correct me if I'm
10 wrong, about officers hearing horrible noises from behind
11 that white sheet that night, hearing the victim scream or
12 anything like that. Correct me if I'm wrong. But the
13 issue here is, I think, whether the mere presence of this
14 very violent guy celled with a new cell mate when he's
15 used to not having any cell mate at all, followed by a
16 long period of inattention from the prison officers and a
17 lack of taking any step to remove or do anything about
18 the white sheet that was hung to obstruct vision --

19 MR. DARLING: So that's why, Your Honor, I think
20 why -- because Burnes was the supervisor at the time, but
21 he wasn't onsite over the night, but he was the guy
22 responsible for this unit. And so that's why, as it
23 relates to inmate distress on prior occasions, you know,
24 I think that's why it is so crucial, including exactly
25 not just, hey, I'm physically threatened right now, but

1 even something like prior covering of sheets that the
2 correctional officers can't do proper safety checks. So
3 I just want to emphasize that, you know, that is not just
4 defined so narrowly, that is convenient to the
5 defendants.

6 THE COURT: Go ahead.

7 MR. DARLING: Point two, Your Honor, is that the
8 defendants are maintaining that there is no -- they did
9 not hear anything, but I think there may be evidence that
10 there were others.

11 THE COURT: Yeah, I'm operating on the pleadings
12 as they stand.

13 All right. So is 15 now put to bed?

14 MR. DARLING: Can we -- is there a date by which
15 they have to produce? Because I'm just worried about
16 another two-month delay.

17 THE COURT: How about a one-month delay?

18 MR. DARLING: Produce by February 4th? I mean,
19 excuse me, March 4th?

20 THE COURT: March 4th, please.

21 Mr. Duggan, does that give you enough time?

22 MR. DUGGAN: It should to, yes, bring things up to
23 the present.

24 But I do want to go back to the definition because
25 we had -- of what's being produced under the -- under the

1 adjusted ruling, what I have written down is reported --
2 dishonesty related to reporting responses to inmate
3 distress. Is that what we're -- as understood based on
4 the discussion of the last few minutes?

5 MR. DARLING: I also heard allegations of
6 dishonesty related to complaints. And so it's not just
7 distress, but complaints about Sergeant Burnes' lack of
8 honesty in doing these job functions.

9 THE COURT: So we got two points: What did they
10 do in response to signs of distress? Whatever they were.
11 We don't have details about them. All we know is the
12 white sheet and the celling of two who probably shouldn't
13 have been celled together.

14 The second question -- and it's separate, I
15 think -- is what the officers did once they realized what
16 had happened behind that curtain. And there the question
17 of the cover-up comes in. I don't know if the cover-up
18 issue would extend to the reasons for the double-celling
19 or the reasons for, as is alleged, failing to go through
20 the entire analysis of determining that it was safe to
21 cell these two people together.

22 MR. DARLING: Plaintiffs' allegations, Your Honor,
23 are that the cover-up is related to the double-celling,
24 and because the double-celling itself was retaliatory to
25 the decedent's prior complaints against Sergeant Burnes

1 himself, because he had filed a complaint against Burnes
2 before --

3 THE COURT: All right. So that's going to cover
4 the inmate complaints referred to in 16, right?

5 MR. DARLING: Off the top of my head. I don't
6 know if -- if the decedent's complaints were five years
7 but, yes, yes, it is about inmate complaints.

8 THE COURT: So are we clear about what we're
9 looking for in 15 and 16?

10 MR. DARLING: Mr. Duggan, I believe that's
11 questions for you.

12 MR. DUGGAN: Honestly, it is still a little bit
13 murky to me, Your Honor.

14 THE COURT: Then why don't you repeat to me what
15 you think is called for in 15 and 16.

16 MR. DUGGAN: In addition to what's -- what was
17 discussed in the last -- the last time, December 10,
18 2024, allegations of dishonesty or cover-ups or
19 retaliation relating to reporting, responses to inmate
20 distress, I think that's all, but --

21 THE COURT: And the classification.

22 MR. DUGGAN: And the classification, which I felt
23 was covered in the December hearing, but, yes, and
24 classifications okay.

25 THE COURT: Okay. Can we go to 18?

1 MR. DARLING: Your Honor, just on 16, there was an
2 issue. The complaints about allegations of bias last
3 time we were -- at the December hearing were allegations
4 of racial bias and it was narrowed to bias against other
5 Hispanics. Mr. Duggan says there's no complaints against
6 southern Hispanics, but there are allegations of racial
7 bias against Sergeant Burnes. So it is my position that
8 his racial bias, especially under California state law,
9 pitches dishonesty and racial bias is discoverable and so
10 this should be turned over.

11 THE COURT: I'm a little confused. And perhaps
12 that I just have not understood what you have recounted,
13 but were there allegations of racial bias against this
14 officer, specifically targeted against southern
15 Hispanics?

16 MR. DARLING: It's my understanding -- that is an
17 allegation. It is my understanding that there are --
18 that Mr. Duggan's position is that there are not
19 allegations of racial bias against southern Hispanics,
20 but there are allegations of racial bias against black
21 inmates. And so -- so there is an allegation of racial
22 bias. And so Mr. Duggan is cutting it finally to say it
23 doesn't apply. And I'm saying wait a second, this is an
24 allegation of racial bias. I'm entitled to it.

25 MR. DUGGAN: That was the definition that was

1 decided in the last hearing and it was Mr. Darling's
2 suggestion, that it be limited to bias against southern
3 Hispanics because that's what -- that's what would relate
4 to this case.

5 THE COURT: I agree. I agree. I don't think we
6 need to broaden it, Mr. Darling.

7 MR. DARLING: Okay.

8 THE COURT: All right. Are we ready for 18?

9 MR. DARLING: Yes, Your Honor. The point here is
10 the retaliation. So retaliation, is it retaliation about
11 just classification versus retaliation? There is a
12 document at issue that there is retaliation for filing a
13 602 complaint. And I think Mr. Duggan can state his
14 position, but he's saying that it's too narrow and it
15 wouldn't contemplate producing a document about
16 essentially retaliation for filing a 602.

17 MR. DUGGAN: So at the previous hearing, this was
18 discussed and limited to retaliation by classification or
19 by housing an inmate in a certain way. So in other
20 words, Burnes retaliated against me by housing me here or
21 housing me -- or placing me with a certain inmate. And
22 so that's what was -- that's what the ruling was at the
23 previous hearing.

24 I now understand that we're going to expand it.
25 We've just -- the retaliation portion, as we just

1 discussed, with regard to No. 15. And so I think that's
2 the ruling. I'll go back and look for any retaliation on
3 that basis.

4 MR. DARLING: But, Your Honor, to be frank, I do
5 not think this is a new thing at issue. In the prior
6 hearing, there was retaliation and problems with
7 classification, but it wasn't the retaliation strictly
8 confined to retaliation by wrongly classifying. It's
9 retaliation is retaliation.

10 THE COURT: I'm not sure I understood the
11 difference between retaliation in the form of wrongful
12 classification or vengeful classification and retaliation
13 is retaliation. We're dealing with a particular form of
14 retaliation here. It is the retaliation of the housing
15 assignment that is alleged. So why don't we limit it to
16 what's alleged.

17 MR. DARLING: Well, Your Honor, because I think
18 there's so many ways that someone like a sergeant
19 responsible for a unit can retaliate -- and so that
20 retaliation against other -- that other complaints, other
21 personal complaints against Sergeant Burnes as it related
22 to acts of retaliation, I don't think they should be
23 refined to just how he retaliated in reclassifying. It
24 can be retaliating from physical violence to harassment
25 to not moving a sheet in a cell and so I -- it seems to

1 me that based on the Court's ruling for 15, it's that the
2 retaliation, of course, can be in the classification
3 process, but it can be manifesting in some other ways
4 that we don't know about.

5 MR. DUGGAN: I think we discussed it on 15 and,
6 you know, retaliation, it is expanded, so it is
7 retaliation in terms of reporting responses to -- to
8 inmate -- to inmate distress and classification. I think
9 that's --

10 THE COURT: I think those are the two things that
11 are at issue here, retaliation in terms of more onerous
12 work assignments. Moving someone from the bottom bunk to
13 the top bunk. That would get us into too many rabbit
14 holes that aren't relevant to the case. So let's keep it
15 to the two forms of retaliation that are at issue in the
16 case.

17 MR. DARLING: But something -- that example, I
18 think, is limited, Your Honor, because -- like, a work
19 assignment, for instance, can be a form of distress,
20 right, if an inmate is assigned to some onerous
21 assignment, that is itself a form of distress. And so
22 I --

23 THE COURT: What's the evidence that it happened
24 here, with either Osuna or Romero?

25 MR. DARLING: Well, here, it's the classification,

1 but certainly it's also the distress related to not
2 covering up or not enforcing the law about covering up --
3 the coverings.

4 THE COURT: Right, we talked about that.

5 MR. DARLING: Not doing the safety checks. And
6 so, you know, there's distress, but there can be prior
7 complaints, personal complaints, against Sergeant Burnes
8 that aren't just exactly the scenario. It can be
9 Sergeant Burnes, you know, retaliating by assigning an
10 inmate to a more onerous work assignment or, you know, a
11 bunk if they have back issues. There's -- again, there's
12 ways they can exert power that qualify as harassment that
13 I think are squarely within what's requested for 18.

14 THE COURT: But if we limit 18 to retaliation in
15 classification decisions and in -- it's really the key
16 personnel complaints against you from the five years
17 before this incident of using retaliation in making
18 classification decisions. That is tailored to what we're
19 talking about.

20 MR. DARLING: There's also inmate distress, and so
21 it seems that inmate distress, which is what clearly --
22 what --

23 THE COURT: If you want to ask -- if you want to
24 ask another question, all personnel complaints against
25 you from five years prior to the date of the incident for

1 retaliatory failures to respond to acute calls for
2 urgently needed inmate distress or protection, I think
3 those are the two things we're getting at.

4 MR. DARLING: Understood. We'll do both.

5 THE COURT: All right.

6 MR. DARLING: Thank you, Your Honor.

7 THE COURT: That takes us to 31.

8 MR. DARLING: Yes.

9 THE COURT: The drugs that Mr. Osuna got.

10 MR. DARLING: Right.

11 THE COURT: I assume it's a long list.

12 MR. DARLING: And so last we spoke, Mr. Duggan
13 said he got the wrong dates and that we will be producing
14 it when we get it, and he says hopefully in two weeks. I
15 just don't want that to be a hope, given the delay. So
16 if the Court, I guess, can put that same, you know,
17 March 4th --

18 THE COURT: That's fine.

19 Okay. The C-file for Mr. Osuna, any issues on
20 that?

21 MR. DARLING: So there are -- there's the mental
22 health records and also the non-mental health records.

23 THE COURT: So here's my question: On the mental
24 health records, did the correctional officers who would
25 have been on duty the night of the incident, did they

1 have access to the mental health records?

2 MR. DUGGAN: So that's -- the parts that were in
3 Osuna's C-file, yes. The mental health services delivery
4 system records, no.

5 THE COURT: So produce the part that was available
6 to the correctional officers who were on duty that night.

7 MR. DARLING: Thank you.

8 MR. DUGGAN: Those records are absolutely
9 privileged in our view.

10 THE COURT: That's fine. I will draft or someone
11 will draft for me an order compelling the production for
12 attorneys' eyes only in this case.

13 MR. DARLING: And if the court -- I would really
14 appreciate if the Court does that because there's been
15 such delay. I mean --

16 THE COURT: Draft me an order. Draft me a
17 proposed order and run it by Mr. Duggan.

18 MR. DARLING: We did that in December, Your Honor,
19 and they objected and here we are two months later. And
20 so they -- we're still fighting over it and Mr. Duggan's
21 last proposal is for more briefing on this issue.

22 THE COURT: No, we're not going to have more --

23 MR. DARLING: It's getting laughable, Your Honor.

24 THE COURT: No more briefing.

25 So, Mr. Duggan, what is the issue if I order

1 subject to attorneys' eyes only under strict
2 confidentiality to be used only in this case, the
3 psychiatric documents in the C-file that were available
4 to the officers on duty that night?

5 MR. DUGGAN: The issue is all the mental health
6 records are protected -- absolutely protected from
7 compelled disclosure under the *Jaffee* case. So because
8 -- because Mr. Osuna hasn't waived that privilege, it's
9 the psychotherapist-patient privilege, common law
10 privilege created by the Supreme Court in the *Jaffee* case
11 --

12 THE COURT: Does Mr. Osuna have the mental
13 capacity to waive?

14 MR. DARLING: Your Honor, I would just like to
15 flap (sic) my arms right here and say that he is
16 misstating the law, that there's a Ninth Circuit case
17 called *Romo* that we briefed, that says it is not an
18 absolute privilege. So I think this is a misstatement of
19 the law. And *Romo* actually defines the contours where,
20 in fact, it could either be waived or it does not apply.
21 And so I think the Court is well within its power to --
22 to order this and it is absolutely not an absolute
23 privilege.

24 THE COURT: All right. So I apologize if I'm
25 retreading ground that we tread some months ago. It's

1 been some months. But I would propose Mr. Darling draft
2 me a stout order that is lauded with citations to the
3 authorities that you say authorize this limited release
4 under terms of confidentiality and restriction to
5 attorneys' eyes only. Lard it up.

6 MR. DARLING: Okay.

7 THE COURT: And then make sure that Mr. Duggan has
8 a chance to see it.

9 MR. DARLING: Okay. I will do that.

10 MR. DUGGAN: And, Your Honor, just to the question
11 of -- because you asked whether Mr. Osuna has the
12 capacity to waive or not waive. We asked -- Mr. Osuna
13 has a -- has an attorney in the criminal matter, which is
14 still pending, and he -- so we asked Mr. Osuna's attorney
15 whether he would waive and Mr. Osuna's attorney said no.

16 MR. DARLING: But here's the point on that:
17 Within the criminal context, Your Honor, CDCR has waived.
18 CDCR -- and I've briefed this.

19 CDCR turned over Osuna's mental health records in
20 the criminal case because Osuna's mental health was at
21 issue in that case, and now here CDCR's position is they
22 can't turn it over. And so it's just so inconsistent.

23 THE COURT: So I have a question. I don't know if
24 you do this in California, but in Texas, I routinely get
25 requests to waive privileges or protections that were

1 imposed in one context in a different context. For
2 example grand jury proceedings, moving on what was in the
3 grand jury proceedings. Here, we move from criminal to
4 civil, different context. I don't understand why there
5 would not be an ability to argue and present an order
6 that would say, because this is a different context,
7 because this is a -- because the records would be used in
8 this fashion and subject to these protections, we can
9 overcome what Mr. Duggan has described as a presumption.
10 So we say more than a presumption to begin production for
11 this purpose.

12 MR. DARLING: I can include that in the order I
13 submit, Your Honor.

14 MR. DUGGAN: Your Honor, I really think that would
15 include more briefing to make -- to make that decision
16 that this is a -- that this --

17 THE COURT: Can I ask you a question, Mr. Duggan?

18 MR. DUGGAN: Yes.

19 THE COURT: Is there any other way to get the
20 information?

21 MR. DUGGAN: Is -- the information that's --
22 that's absolutely privileged. It's as the Supreme Court
23 said, this decision in *Jaffee* may result in probative
24 evidence not being available for these cases because it's
25 an absolute -- an absolute psychotherapy patient

1 privilege. So for another way for Plaintiffs to get the
2 information, my suggestion would be they send a subpoena
3 to CDCR because -- and that -- and with that include a
4 waiver from -- from Mr. Osuna and that's how you can get
5 the --

6 THE COURT: So if he doesn't waive?

7 MR. DARLING: Right.

8 MR. DUGGAN: Then it's not available under this
9 principle.

10 MR. DARLING: This misstates the law, Your Honor.
11 *Romo* says -- a Ninth Circuit held that a defendant, for
12 instance, a confession to a prison counselor is not
13 protected, so if there is a desire to kill or discussion
14 about violence, the confession is not even protected. So
15 this is an overstatement of the law.

16 THE COURT: So to the extent we have those kinds
17 of statements, what else do we need?

18 MR. DARLING: That's my point.

19 MR. DUGGAN: Your Honor --

20 THE COURT: Have you produced those kinds of
21 statements?

22 MR. DARLING: No, he has not.

23 THE COURT: Produce the statements. Let's look at
24 the statements under the case law and you can produce
25 them again attorneys' eyes only and confidential, and if

1 after producing the statements, if we need to continue to
2 argue over whether that's a sufficient basis to require
3 the remaining records to be produced, we can have that
4 discussion at that point.

5 MR. DARLING: Thank you, Your Honor.

6 The other contour --

7 THE COURT: Hang on. Hold on. Mr. Duggan had
8 something to say.

9 MR. DARLING: Sorry.

10 MR. DUGGAN: There isn't even a request that --
11 that -- on this that would encompass those statements,
12 and to the extent that those -- that that -- so -- so
13 Sergeant Burnes would object to producing it on that
14 basis. And then the -- you know, to the extent we're
15 covering now the non-C-file mental health records, the
16 mental health services delivery system records, those are
17 again absolutely privileged and they're not in Sergeant
18 Burnes' possession, custody, or control. He has no
19 access to those.

20 THE COURT: Who has them?

21 MR. DUGGAN: CDCR.

22 THE COURT: So why don't you take a deposition of
23 CDCR?

24 MR. DARLING: Your Honor, here's the other issue
25 though: Because the Court mentioned earlier this is

1 about officers who were on duty that day --

2 THE COURT: Right.

3 MR. DARLING: -- but there is a second issue, is
4 we have another defendant, Kyle, the social worker. The
5 social worker was part of the classification process, and
6 so we've sought what that person had access to. But also
7 that person, Kyle, the social worker, who's now married
8 name is Maytubby -- Kyle at the time -- and this is
9 Osuna's statements -- met with Osuna and would have
10 received those statements. And those statements very
11 well might not have had -- the COs on duty that night may
12 not have access to it, but Kyle/Maytubby is also a
13 defendant to it. So those non-C-file records that
14 Mr. Duggan is sequestering are squarely pertinent to the
15 claims against the social worker.

16 THE COURT: Okay. So the C-file, that would have
17 been available to the prison officers who were making
18 these decisions, that will be produced. And, again, the
19 usual confidentiality, bells and whistles will be
20 maintained.

21 So are we now on the docket -- the document, the
22 RFP 48 documents, that pertain to any act of violence by
23 Mr. Osuna?

24 MR. DARLING: Correct. Insofar as we're moving
25 away from the C-file, it would be the acts of violence

1 or, you know, desire to commit violence, that these are,
2 you know, statements that were made to Kyle and other,
3 you know, mental health people that were -- you know, in
4 the process of the classification.

5 THE COURT: And this would have been statements
6 that he made while he was incarcerated about what he
7 wanted to do while incarcerated.

8 MR. DARLING: Correct, Your Honor. Correct.

9 THE COURT: Objection, Mr. Duggan?

10 MR. DUGGAN: To the extent we're talking about
11 mental health service delivery, the mental health
12 services records that Sergeant Burnes doesn't have access
13 to, they're not in his possession, custody, and control.
14 So this request is directed to Sergeant Burnes. He
15 doesn't have access to them.

16 THE COURT: All right. But you're going to take a
17 deposition or seek the discovery from the entity that
18 does, correct, Mr. Darling?

19 MR. DARLING: Right. Maybe this is a cart before
20 the horse thing, but we would need the order, if we do a
21 30(b) (6) deposition, if I'm sending that out, I can be
22 doing the song and dance in 30 days. We would need the
23 order for a request, either the 30(b) (6) or to social
24 worker Kyle/Maytubby.

25 THE COURT: The key to the griffin is in your

1 hand. Get me the formal order. Get me your motion and
2 formal order. Mr. Duggan can object, but it needs to be
3 hedged around with all of those confidentiality
4 protections that we discussed.

5 MR. DARLING: Absolutely, Your Honor.

6 MR. DUGGAN: We likely will plan to object and
7 CDCR will likely object to the absolute privilege as
8 we've discussed before.

9 THE COURT: I think we disagree over how absolute
10 absolute is.

11 MR. DARLING: Your Honor, I will submit this later
12 this week. Is there -- just because I really appreciate
13 the Court's attention to this, but I know the Court has
14 so many other cases. Is there a mechanism where if in a
15 week after submitting I can just bother Ms. Hassan just
16 to make sure we can get this?

17 THE COURT: Yes, just bother Ms. Hassan.

18 MR. DARLING: Thank you. I appreciate it.

19 THE COURT: All right. I appreciate your
20 concerns, Mr. Duggan, but it is an unusual case and we're
21 dealing with information that is very hard to get. So
22 we're struggling with the usual restrictions on the type
23 of information that can be obtained in a case that simply
24 can't proceed without that information. So that --

25 MR. DUGGAN: Thank you.

1 THE COURT: So I'm not faulting you for balking.

2 Okay. That takes us to the IST training?

3 MR. DARLING: Yes.

4 THE COURT: As long as it's the training that led
5 to the lapses or the training that corresponds to the
6 lapses that are alleged in the complaint.

7 MR. DARLING: I'd just request the same deadline
8 apply in a month, March 4, 2025. Mr. Duggan said that
9 he's going to follow up with this, but he says he doesn't
10 know if there's any documents. And so I think that the
11 issue here is -- it seems very fishy to me, that they
12 acknowledge that there was a training, that this training
13 occurred and yet there's no record of it. And it's like
14 trainings are not that just seat of the pants.

15 THE COURT: That's either going to be producing
16 the records, producing the names of people who would have
17 been either involved in or knowledgeable about providing
18 the trainings, specifically dealt with dealing with
19 window covers, guard wind checks, count procedures, or
20 cell obstructions.

21 MR. DUGGAN: Okay. This request is for
22 information about a specific training that took place on
23 March 10th and, I mean, there's not no records.
24 Plaintiff refers to a record of it. And, you know, so --
25 you know, we haven't been able to locate any other

1 records at this point.

2 THE COURT: So if the answer is there wasn't
3 anything on March 10th and the question doesn't cover
4 other training on other dates, then perhaps a different
5 question needs to be asked.

6 MR. DARLING: No, no. It's my understanding that
7 Mr. Duggan is saying that they acknowledge that there was
8 a training on March 10th. It's that there --

9 THE COURT: The documents.

10 MR. DARLING: There's not these documents and that
11 seems fishy to me. And so I am just requesting a
12 produce-by date of March 4th.

13 THE COURT: Well, he said there is no training
14 documents to produce.

15 MR. DUGGAN: Right. We haven't found any more
16 documents besides the one that's referenced in the
17 request.

18 THE COURT: Oh, that's what you got out of the
19 question that you presently framed.

20 84.

21 MR. DARLING: Okay. So 84. And there's 85, they
22 kind of ducktail, Your Honor.

23 THE COURT: Right.

24 MR. DARLING: The issue -- the first issue is the
25 cell status review. It's what documents were reviewed in

1 the process, and in talking just to Mr. Duggan about
2 this, there's -- some part of the ICC review is done by a
3 mental health specialist, who in this case was Defendant
4 Kyle now Maytubby. Mr. Duggan's position is that
5 pre-mental health review is not -- is not part of the
6 ICC. It's before the ICC. And I'm saying, wait a
7 second, that's kind of silly. If it is the person who is
8 the mental health specialist and is the representative
9 for that purpose for the ICC review, surely, what she
10 reviews is part of the ICC review process because it's
11 her role in the ICC review.

12 THE COURT: I'm having a little trouble
13 understanding what the difference is between what you say
14 Mr. Duggan says and you're saying. Is Mr. Duggan saying
15 that the -- that the psychiatrist reviewed before the ICC
16 review took place, but was part -- but that information,
17 her review or his review, was part of what the ICC looked
18 at?

19 MR. DARLING: I am saying that is part of the ICC
20 and he's saying what they did is pre-ICC review and --

21 THE COURT: And is it reviewed by the ICC?

22 MR. DARLING: It's my understanding that it's part
23 of what Kyle brings to the table when she is part of the
24 ICC review, so yes.

25 THE COURT: So how is what you're saying different

1 from what -- functionally there may be formal
2 differences, procedural differences. How does it wind up
3 being different?

4 MR. DARLING: I think for purposes of Mr. Duggan
5 he's saying it's not part of the review and thus not
6 responsive and so they're not going to produce it,
7 besides the other objection they have of saying these are
8 the mental health records and that they're not
9 discoverable, but the Court has already addressed that,
10 you know, with the order. Essentially the second
11 objection is that these are mental health records and
12 thus that *Jaffee* case applies, but obviously the Court
13 has addressed that issue. But I think the other
14 objection -- and Mr. Duggan can disagree with me, but
15 it's my understanding, his position is saying that the
16 records that they acknowledge to exist are not part of
17 the ICC review.

18 THE COURT: The cell status review, is that the
19 review you're talking about?

20 MR. DARLING: Yeah, yeah, the January 2019 cell
21 status review. Yes, Your Honor.

22 THE COURT: So it's not part of it, but is it
23 reviewed in conducting the cell status review?

24 MR. DARLING: Yes.

25 THE COURT: Mr. Duggan?

1 MR. DUGGAN: Yeah. So --

2 THE COURT: It doesn't have to be paper-clipped
3 together.

4 MR. DUGGAN: Right. The issue that I -- that I
5 brought up with Mr. Darling was that, okay, so it says
6 the Corcoran Prison ICC review in conducting its cell
7 status review only, you know, it's not the whole ICC
8 review that would review those documents, only what the
9 mental health specialists would have access to and would
10 be able to review, and Plaintiff has sued the other
11 members of the ICC as well. So saying that the ICC --

12 THE COURT: Wait, wait, wait. Let me get this
13 straight. If the -- if a portion, a specialized portion
14 of the ICC reviews the documents, including the mental
15 health documents and then it makes a report to the other
16 members of the ICC so that the cell status review can be
17 conducted by the entire group, be responsible for the
18 classification decisions, doesn't that bring it into
19 discoverability?

20 MR. DUGGAN: Certainly it's a -- I mean, I think
21 that -- it does bring it into a discoverability and we
22 still are objecting because it's not within Burnes'
23 possession, custody, and control. But the -- but, yeah,
24 it's just -- my question was more about whether this
25 particular request asks for it because it says the ICC

1 reviewed.

2 THE COURT: Does Mr. Burns get informed about the
3 results of the ICC review?

4 MR. DARLING: Burns is part of it, Your Honor, the
5 process. He was one of the three people.

6 MR. DUGGAN: Not one of the three. He was
7 present, but he's not one of the --

8 THE COURT: He was present. He knows what
9 happened. He gets reported to them. Fair enough?

10 MR. DUGGAN: He's present for the report.

11 THE COURT: Okay. Provide these documents. I
12 don't see --

13 MR. DUGGAN: These are the mental health records
14 that Burnes does not have access to. They are not in his
15 possession, custody, and control --

16 THE COURT: So Mr. Darling knows how to get them
17 and they will be separately sought and again accompanied
18 with the confidentiality and attorneys' eyes only
19 protections.

20 MR. DARLING: Perfect, Your Honor. Thank you.

21 THE COURT: 85, unless we've already --

22 MR. DARLING: It's similar, but it's -- if
23 anything, some of Mr. Duggan's objections to 84 are
24 addressed by 85 because it includes notes and other work
25 product. So, in fact, it's all these things that would

1 have been reviewed by the clinical social worker Kyle in
2 that process --

3 THE COURT: And reported to the cell site -- cell
4 status review folks?

5 MR. DARLING: Exactly.

6 MR. DUGGAN: So, yeah, this is -- this asks for
7 documents that the Corcoran Prison ICC produced, in other
8 words, the documents they created. Those have been
9 produced already.

10 THE COURT: All right. Great. What else --

11 MR. DARLING: Sorry. Sorry. Your Honor, I'm
12 sorry. It's my understanding based on prior discussions
13 with Mr. Duggan, in fact, that they could not find
14 documents, in that there was this kind of open question
15 that defendants had and what exactly was the universe of
16 documents. So this is actually new to me because
17 Mr. Duggan has previously represented that the issue is
18 in defining the universe of documents, not that they've
19 actually produced them.

20 THE COURT: So you've now totally confused me
21 because you said you got these documents and that was
22 totally new to you.

23 MR. DARLING: Right.

24 THE COURT: Do you need additional documents that
25 are within category number -- RFP No. 85?

1 MR. DARLING: Yes. Yes.

2 THE COURT: What do you need?

3 MR. DARLING: The notes and other work product
4 that up until just right now that Mr. Duggan has said he
5 does not have access to or were subject to the mental
6 health records or the mental health privilege.

7 MR. DUGGAN: Not what I had previously said.

8 THE COURT: Okay.

9 MR. DUGGAN: I said that we produced all the
10 documents that the Corcoran Prison ICC produced.

11 MR. DARLING: My notes from our last meeting,
12 quote, we have mental health records and are waiting for
13 an order, including core mental health records, so we're
14 waiting for an order -- and that he's not taking a
15 position whether ICC reviewed, including mental health
16 records, because some of these notes in our January 30th
17 conversation would be considered core mental health
18 records. And so now he's saying he's produced it and
19 that's what our prior conversation included.

20 MR. DUGGAN: I think your notes are for our
21 discussion of 84.

22 On 85, the request is documents Corcoran Prison
23 ICC produced, the documents that the ICC created. Those
24 have been produced already.

25 MR. DARLING: Again, it's how you slice it. If

1 Kyle, in doing the mental health aspect, and as you
2 described, was this kind of pre-ICC part, that is, in
3 fact, part of the ICC, but the mental health component,
4 those mental health records are indeed work product for
5 the ICC and those have not been produced, I thought.

6 MR. DUGGAN: You're saying notes taken by
7 Kyle/Maytubby in preparing. Okay. I don't think there
8 is such a thing, but we can look for it.

9 THE COURT: Look for it. Confirm its presence.
10 If you can confirm its presence, explain first to
11 Mr. Darling and then if needed to me why you shouldn't
12 need to produce it. If you cannot confirm its presence,
13 tell that to Mr. Darling and Mr. Darling can make a
14 decision as to whether he wants to probe that further.

15 MR. DARLING: Thank you, Your Honor.

16 THE COURT: I think we reached the end of the
17 list.

18 MR. DARLING: We have.

19 THE COURT: I do have two additional questions,
20 maybe three. Some of it is simply to refresh a fading
21 memory.

22 Ms. Stocker, what is your role in this? You're on
23 mute.

24 MS. STOCKER: Your Honor, I represent Officer
25 Silva.

1 THE COURT: All right.

2 MS. STOCKER: I am not involved in this particular
3 discovery dispute. I did however -- if you're asking, we
4 did file a motion to dismiss.

5 THE COURT: Yes, I'm aware of that.

6 MS. STOCKER: And that's my role at the moment.

7 THE COURT: Thank you.

8 Mr. Kuchinsky?

9 MR. KUCHINSKY: I'm co-counsel with Mr. Duggan,
10 Your Honor. I work at the Attorney General's Office as
11 well.

12 THE COURT: All right. I know we talked earlier
13 about non-adversarial resolutions in this and you
14 mentioned that you already explored some forms. Does it
15 make sense to be thinking in advance of rulings on the
16 motion to dismiss that are pending, whether there is any
17 hope for any kind of mediation given what you're learning
18 about the case?

19 MR. DARLING: I would like, Your Honor, just to
20 walk and chew gum. So we have a mediation scheduled with
21 a respected private mediator. But then I would also like
22 for these additional defendants to answer, so we can
23 schedule their depositions. Plaintiff has deposed
24 majority of the individual defendants, but not all. And
25 so I want to -- ideally have them answer and then they

1 can respond to some discovery requests and then sit for
2 their depositions.

3 THE COURT: So you're looking at a mediation when?
4 In 2027?

5 MR. DARLING: No, in a couple months.

6 MR. DUGGAN: It's March 25th, Your Honor.

7 THE COURT: And who is the mediator? I don't know
8 if I'm going to know him or her.

9 MR. DARLING: Richard Copeland.

10 THE COURT: In California?

11 MR. DARLING: Yes, Your Honor.

12 THE COURT: All right. Well, let us know what
13 happens after the mediation concludes, please.

14 MR. DARLING: Thank you, Your Honor.

15 Yeah. I mean, I think just given how slow it's
16 been to get certain documents, it's just, you know,
17 doing -- just beginning the process, to prepare for these
18 depositions. Yeah, I just want to again walk and chew
19 gum.

20 THE COURT: Is this mediation intended to cover
21 both this lawsuit and the lawsuit brought by Ms. Solares
22 about the dissemination of the pictures?

23 MR. DARLING: Yes, Your Honor. Yes.

24 THE COURT: That would be good.

25 MR. DARLING: I think all parties agree that if

1 there's going to be settlement it will be global.

2 THE COURT: Very good. All right. Well, I'll put
3 the candies out for you and light the candles.

4 MR. DARLING: Appreciate that.

5 THE COURT: General question, are the California
6 courts since the fires, at least in the LA area, pretty
7 much back to normal?

8 MR. DARLING: Yes, they are.

9 THE COURT: Good.

10 MR. DARLING: It was a rough January. But it's
11 now going to be a rainy February, I think it is.

12 THE COURT: Very good. I'm impressed.

13 All right. Anything else for today?

14 MR. DARLING: The only thing I'm forecasting a
15 problem, if there is additional, I guess, delay or
16 briefing from -- from defense counsel on these mental
17 health records, is there some kind of timeline that we
18 can expect, you know, the order to be issued?

19 THE COURT: You're going to draft me an order.

20 MR. DARLING: Yes, Your Honor, this week.

21 THE COURT: Mr. Duggan is going to look at it and
22 hopefully his objections will be none other than the ones
23 we've already discussed. And Mr. Darling's formal order
24 will reflect that those discussions and rulings have
25 already taken place. If the order is presented to me in

1 that fashion, I anticipate no delay in getting it signed.

2 MR. DARLING: Thank you, Your Honor.

3 THE COURT: All right. Have a very pleasant
4 afternoon.

5 MR. DARLING: Thank you so much.

6 THE COURT: Enjoy the rain.

7 MS. STOCKER: We are.

8 THE COURT: Thank you very much. You are all
9 excused.

10 MS. STOCKER: Thank you, Your Honor.

11 * * * *

12 (WHEREUPON, the proceedings were adjourned.)

13 * * * *

14 REPORTER'S CERTIFICATE

15 I, Nichelle N. Drake, RMR, CRR, Official Court
16 Reporter, United States District Court, Eastern District
17 of Louisiana, do hereby certify that the foregoing is a
true and correct transcript, to the best of my ability
and understanding, from the record of the proceedings in
the above-entitled and numbered matter.

18

19 /s/ Nichelle N. Drake
20 Official Court Reporter

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